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6 Attorneys for Defendant
DEUTSCHE LUFTHANSA AKTIENGESELLSCHAFT,
7 doing business as "LUFTHANSA GERMAN AIRLINES"

8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10
11 SEBASTIAN POGGEL,

12 Plaintiff,

13 vs.

14 LUFTHANSA GERMAN AIRLINES
and EXPEDIA, INC. dba
15 EXPEDIA.COM,

16 Defendants.
17

) Case No. CV 12-4794 OW (JEMx)

) **RESPONSE OF DEUTSCHE**
) **LUFTHANSA**
) **AKTIENGESELLSCHAFT TO**
) **OSC RE REMAND**

18 Defendant Deutsche Lufthansa Aktiengesellschaft, doing business as
19 "Lufthansa German Airlines" ("Lufthansa"), by and through its attorneys, Condon
20 & Forsyth LLP, hereby submits its response to the Court's Order to Show Cause re
21 Remand to state court as follows:

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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3 **INTRODUCTION**

4 The removal of this action from state to federal court is proper because this
5 case is preempted by the Airline Deregulation Act. Plaintiff Sebastian Poggel
6 (“plaintiff”) has alleged in his small claims complaint that Lufthansa and Expedia,
7 Inc. (“Expedia”) refused to honor airline tickets he purchased for carriage on two
8 Lufthansa flights. The two tickets at issue were immediately refuted by Lufthansa
9 because they were inadvertently posted on Expedia’s website at an incorrect rate
10 due to a date entry error. The instant action is plaintiff’s state law enforcement
11 action to enforce the incorrect rates. Accordingly, this suit affects the “rates,
12 routes and services” of Lufthansa and is thus preempted by the Airline
13 Deregulation Act.

14
15 **FACTS**

16 As this is a small claims matter, the plaintiff’s small claims complaint does
17 not contain a thorough explanation of plaintiff’s lawsuit, or upon which theories of
18 liability he seeks recovery. Lufthansa offers this explanation of facts in an attempt
19 to objectively flesh out the nature of plaintiff’s complaint.

20 On March 14, 2012, plaintiff purchased two first class Lufthansa tickets for
21 round-trip carriage from Prague, Czechoslovakia, with intermediate stopping
22 points in Frankfurt, Germany, Johannesburg, South Africa, and Capetown, South
23 Africa. *See* Exhibit “A” to declaration of Ivy L. Nowinski (“Nowinski decl.”)
24 [April 5, 2012 e-mail from plaintiff to Lufthansa].

25 Plaintiff was informed by Lufthansa on March 23, 2012 that Lufthansa
26 refuted these contracts of carriage, because the ticket rates were erroneously priced
27 on Expedia’s website due to a data entry error. *See* Exhibit “B” to Nowinski decl.
28 [March 23, 2012 letter from Lufthansa to plaintiff]. In its March 23, 2012 letter,

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1 Lufthansa offered plaintiff fourteen days to purchase the tickets at a substantially
2 discounted price. *Id.*

3 On April 4, 2012, Expedia notified plaintiff that his passenger tickets were
4 cancelled by Lufthansa due to an error with respect to the rates posted on its
5 website. *See* Exhibit “C” to Nowinski decl. [April 4, 2012 e-mail from Expedia to
6 plaintiff].

7 On April 11, 2012, Expedia notified plaintiff that it was unable to reinstate
8 plaintiff’s flights at the price he originally paid. Expedia also notified plaintiff that
9 its Terms of Use, published on its website at the time plaintiff purchased his
10 tickets, provided that “Expedia, Inc. expressly reserves the right to correct any
11 pricing errors on our website and/or on pending reservations made under an
12 incorrect price.” *See* Exhibit “D” to Nowinski decl. [April 11, 2012 letter from
13 Expedia to plaintiff].

14 On April 12, 2012, plaintiff filed the instant action, seeking recovery for the
15 tickets he purchased at an incorrect rate. *See* Exhibit “E” to Nowinski decl.
16 [plaintiff’s complaint]. Plaintiff’s complaint contains only the following statement
17 as to its theory of liability against Lufthansa: “Lufthansa and it’s [sic] agent
18 Expedia refuse [sic] to honor two airline tickets (No. 220-7045046605 and 220-
19 7045068524) purchased. The plaintiff requires a replacement and relief for
20 damages.”

21 Lufthansa was served with a copy of the summons and complaint on May
22 17, 2012. Lufthansa timely filed its notice of removal on June 12, 2012.

23 24 ANALYSIS

25 This action has been properly removed from the Los Angeles County
26 Superior Court to the United States District Court for the Central District of
27 California because plaintiff’s lawsuit is a state law enforcement action relating to
28 Lufthansa’s rates, routes, and services.

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The Airline Deregulation Act expressly prohibits states from enacting or enforcing any law relating to the “price, route, or service of an air carrier. 49 U.S.C. § 41713(b)(1) (West 2012). The Supreme Court has addressed preemption under the Airline Deregulation Act a number of times, most notably in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992); *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995); and *Rowe v. N.H. Motor Transp. Association*, 552 U.S. 364, 128 S.Ct. 989, 169 L.Ed.2d 933 (2008). In *Morales*, the Supreme Court noted that Congress enacted the Airline Deregulation Act to deregulate domestic air transport, and included the preemption clause “[t]o ensure that the States would not undo federal deregulation with regulation of their own.” *Morales*, 504 U.S. at 378, 112 S.Ct. 2031. The Supreme Court has also held that the Airline Deregulation Act “was designed to promote maximum reliance on competitive market forces.” *Wolens*, 513 U.S. at 230, 115 S.Ct. 817 (*quotation marks omitted*); 49 U.S.C. § 40101(a)(6).

In *Morales*, the Supreme Court held that a state law or enforcement action is “related to” a “price, route, or service” if it “has a connection with or reference to” a “price, route, or service,” *see Morales* at 384–88, 112 S.Ct. 2031. At the same time, even if a claim does relate to “price,” the ADA preemption clause does not “shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings.” *Wolens*, 513 U.S. at 228, 115 S.Ct. 817.

The relevant Ninth Circuit precedent is *Sanchez v. Aerovias De Mexico, S.A. De C.V.*, 590 F.3d 1027, 1028 (9th Cir. 2010). In that case, the plaintiff purchased a ticket to fly from California to Mexico. *Id.* The airline collected a tourism tax for the Mexican government from which she was exempt. *Id.* Plaintiff sought relief under California state law for breach of contract and the implied covenant of good faith and fair dealing, as well as for unjust enrichment and

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1 money had and received from the defendant airline. *Id.* The district court
 2 concluded that these claims were preempted by the Airline Deregulation Act
 3 because they related to the airline's "price[s], route[s], or service[s]," and were not
 4 excepted under *Wolens* because Aeromexico had no contractual obligation to
 5 advise passengers about the tax or their right to a refund. *Id.* (*internal citations*
 6 *omitted*). The Ninth Circuit affirmed. *Id.* at 1032.

7 Just as in *Sanchez*, the instant lawsuit is an attempted state law enforcement
 8 action related to Lufthansa's "prices, routes, and services," because plaintiff is
 9 attempting to enforce an incorrect Lufthansa fare. Furthermore, just as in *Sanchez*,
 10 this case is not excepted from preemption under the Airline Deregulation Act
 11 because Lufthansa had no contractual obligation to honor plaintiff's tickets
 12 purchased at an incorrect price. *Balistreri v. Nevada Livestock Product Credit*
 13 *Ass'n*, 214 Cal.App. 3d 635, 642, 262 Cal. Rptr. 862 (1989). No contract was
 14 formed between the parties, because, due to the clerical error, there was no meeting
 15 of the minds. *Id.* Accordingly, Lufthansa properly removed plaintiff's action
 16 from the state to the federal court because plaintiff's lawsuit is an attempt to
 17 enforce Lufthansa's prices under state law.

18 CONCLUSION

19 For all of the foregoing reasons, the removal of this action from the state to
 20 the federal court was proper because plaintiff's lawsuit is a state law enforcement
 21 action relating to the price of Lufthansa tickets, and this Court should retain
 22 jurisdiction over this action.

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1 Dated: June 20, 2012

CONDON & FORSYTH LLP

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3 By: /s/ Ivy L. Nowinski

4 SCOTT D. CUNNINGHAM

5 IVY L. NOWINSKI

6 Attorneys for Defendant

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9 as LUFTHANSA GERMAN AIRLINES
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